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7 UNITED STATES DISTRICT COURT  
8 NORTHERN DISTRICT OF CALIFORNIA  
9 OAKLAND DIVISION

10 OSCAR HERNANDEZ, individually ) Case No.: 12-cv-01515 YGR  
and on behalf of all others similarly )  
11 situated individuals, )  
 )  
12 Plaintiff, ) **MARIA PIROZZI'S OPPOSITION TO SUA**  
 ) **SPONTE JUDICIAL REFERRAL FOR**  
13 v. ) **PURPOSE OF DETERMINING**  
 ) **RELATIONSHIP**  
14 PATH, INC., ) Judge: Hon. Yvonne Gonzalez Rogers  
 )  
15 Defendant. )

17 MARIA PIROZZI, Individually and on ) Case No.: 12-cv-01529 YGR  
Behalf of All Others Similarly Situated, )  
18 )  
Plaintiff, ) **MARIA PIROZZI'S OPPOSITION TO SUA**  
19 ) **SPONTE JUDICIAL REFERRAL FOR**  
v. ) **PURPOSE OF DETERMINING**  
20 ) **RELATIONSHIP**  
APPLE INC., )  
21 ) Judge: Hon. Yvonne Gonzalez Rogers  
Defendant. )  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

MARC OPPERMAN, et al., for )  
themselves and all others similarly )  
situated individuals, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
PATH, INC. et al., )  
 )  
Defendants. )

Case No.: 12-cv-00453 JST  
  
**MARIA PIROZZI'S OPPOSITION TO SUA  
SPONTE JUDICIAL REFERRAL FOR  
PURPOSE OF DETERMINING  
RELATIONSHIP**  
  
Judge: Hon. Jon S. Tigar

1 Pursuant to Civil Local Rule 3-12(c), Maria Pirozzi (“Pirozzi”), a plaintiff in *Pirozzi v.*  
2 *Apple Inc.*, 4:12-cv-01529-YGR (N.D. Cal.) (the “*Pirozzi Action*”), opposes relation of the  
3 *Pirozzi Action* with *Opperman v. Path*, No. 4:13-cv-00453-JST (N.D. Cal.) (the “*Opperman*  
4 *Action*”).<sup>1</sup> As provided further below, the *Pirozzi Action* is not appropriate for relation with the  
5 *Opperman Action* because the two actions do not have any common claims and, except for  
6 Apple Inc. (“Apple”), defendants in the *Opperman Action* are not common with the *Pirozzi*  
7 *Action*. Furthermore, given the fact that the *Pirozzi Action* is now further along than the  
8 *Opperman Action*, judicial economy will not be served by relating the actions.

9 Judge Gonzalez Rogers is familiar with the *Pirozzi Action* having met with counsel for the  
10 parties for an initial scheduling conference<sup>2</sup> and issuing an opinion and order granting Apple’s  
11 first motion to dismiss with leave to amend. In accordance with the Court’s Order, Pirozzi filed  
12 her Second Amended Class Action Complaint (the “SAC”)<sup>3</sup> on January 22, 2013. Apple filed a  
13 motion to dismiss the SAC which has been fully briefed and a hearing on the motion to dismiss  
14 is set for May 7, 2013. See D.I. 31 and 38. The *Hernandez Action* is even further along, with  
15 the parties beginning to brief class certification.<sup>4</sup> Given the significant progress that has taken  
16 place in the two related cases, and for the reasons set out below, Pirozzi respectfully requests that  
17 the Court not relate the *Pirozzi* and *Hernandez* Actions with the *Opperman Action*.

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<sup>1</sup> The *Pirozzi Action* was related to *Hernandez v. Path, Inc.*, 4:12-cv-01515-YGR (N.D. Cal.) (the “*Hernandez Action*”) in July 2012. Pirozzi did not oppose the relation of the actions, but has consistently opposed consolidation or coordination of the Actions, which involve different defendants.

<sup>2</sup> See docket index in the *Pirozzi Action* (“D.I.”) 39.

<sup>3</sup> The SAC is D.I. 29 in the *Pirozzi Action*. Unless otherwise indicated, all citations to “¶\_\_” refers to the SAC.

<sup>4</sup> See docket index 51, 62 in the *Hernandez Action*.

1 **STATEMENT OF FACTS**

2 **A. The Pirozzi Action**

3 Maria Pirozzi brought an action on behalf of herself and other purchasers of the iPhone,  
4 iPod touch and/or iPad mobile devices (collectively, the “Apple Device”)<sup>5</sup> who downloaded  
5 mobile software applications (“apps”) from Apple through an Apple-controlled digital  
6 distribution platform that makes software available to the Apple Devices – the App Store.  
7 Pirozzi alleges that she, and other consumers, were misled into believing that Apple designed  
8 Apple Devices to be secure, when in actuality apps operating on these devices can download  
9 private user data without the user’s consent. See SAC ¶¶9, 61, 81-84. Pirozzi alleges that she  
10 and other purchasers would not have purchased Apple Devices and/or would not have paid as  
11 much for the devices if they knew the true nature of the Apple Devices. As a result, Pirozzi  
12 alleges that Apple (1) violated the Consumers Legal Remedies Act (Cal. Civ. Code §1750, *et*  
13 *seq.*); (2) violated the False and Misleading Advertising Act (Cal. Bus. & Prof. Code §17500, *et*  
14 *seq.*); (3) violated the Unfair Competition Law (Cal. Bus. & Prof. Code §17200, *et seq.*); (4)  
15 made negligent misrepresentations; and (5) was unjustly enriched thereby. With respect to  
16 Pirozzi’s unjust enrichment claim, the SAC sets out that Apple has been enriched as a result of  
17 its misrepresentations concerning Apple Devices because its revenue is based on consumer  
18 demand for its Apple Devices. ¶¶27, 38-40, 43-45, 124. In turn, the popularity of Apple  
19 Devices depends on the availability of third-party apps and, had Apple disclosed the true nature  
20 of the Apple Devices, consumers would not have purchased Apple Devices or would have paid  
21 less for these devices. ¶¶10, 84, 123-126.

22 As provided above, significant developments have occurred in the *Pirozzi* Action with  
23 Judge Gonzalez Rogers having considered one substantive motion to dismiss and a second  
24 motion to dismiss is fully briefed, with a hearing scheduled for May 7, 2013.

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27 <sup>5</sup> Pirozzi seeks to represent a class consisting of all persons who purchased an Apple  
28 Device between June 15, 2010 and the present and who downloaded apps on these devices. ¶14.

1           **B.     The Opperman Action**

2           In contrast to the *Pirozzi* Action, which involves claims against Apple only, the  
 3 *Opperman* Action involves claims by fourteen plaintiffs against fourteen additional defendants.<sup>6</sup>  
 4 The *Opperman* Action seeks relief on behalf of a class<sup>7</sup> based on 16 separate causes of action  
 5 none of which it shares in common with the *Pirozzi* Action<sup>8</sup> and include: (1) Invasion of Privacy;  
 6 (2) Common Law Misappropriation; (3) Conversion; (4) Trespass to Personal Property and/or  
 7 Chattels; (5) Misappropriation of Trade Secrets and Propriety Information; (6) Negligence; (7)  
 8 Interception of Electronic Communication Under the Electronic Communication Privacy Act; (8)  
 9 Fraud in Connection with Computers under 18 U.S.C. §1030(G); (9) claims under Racketeering  
 10 Influenced and Corrupt Organizations Act, 18 U.S.C. §1961-1964, (including predicate acts of  
 11 wire fraud and transportation of stolen property); (10) Theft of Property (Tex. Penal Code  
 12 §31.03); (11) violation of the Texas Theft Liability Act (Tex Civ. P & Rem. Code §134.001);  
 13 (12) violation of California Penal Code §502; (13) violation of the Texas Wiretap Acts; (14)  
 14 violation of California Penal Code §630; (15) Aiding and Abetting; and (16) Unjust Enrichment.

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 16 \_\_\_\_\_  
 17           <sup>6</sup> In addition to Apple, plaintiffs in the *Opperman* Action bring claims against  
 18 manufacturers of certain malicious apps: (1) Burbn, Inc., (2) Chillingo Ltd., (3) Electronic Arts  
 19 Inc., (4) Facebook, Inc., (5) Foodspotting, Inc., (6) Foursquare Labs, Inc. (7) Gowalla  
 20 Incorporated, (8) Hipster, Inc., (9) Instagram, Inc., (10) Kik Interactive, Inc., (11) Path, Inc., (12)  
 21 Rovio Mobile Oy, (13) Twitter, Inc., (14) Yelp! Inc. and (15) ZeptoLab UK Limited. See  
 22 complaint in the *Opperman* Action, docket 103 (“*Opperman* Action complaint”).

23           <sup>7</sup> The *Opperman* Action defines the proposed class as “Plaintiffs and all owners of  
 24 iDevices who obtained Apps from Apple’s App Store that without requesting the iDevice  
 25 owner’s prior consent initiated an unauthorized iDevice call following which the owner’s address  
 26 book materials were copied, uploaded, transmitted, and/or disclosed to others and/or remotely  
 27 stored and/or otherwise remotely used by others, including any of the following Apps: *Angry*  
 28 *Birds Classic*, *Crystal*, *Cut the Rope*, *Foursquare*, *Foodspotting*, *Gowalla*, *Hipster*, *Kik*  
*Messenger*, *Instagram*, *Path*, *Twitter*, or *Yelp!* (the “Class”) and who were damaged thereby.”  
*Opperman* Action complaint (D.I. 103) at ¶46.

<sup>8</sup> While both *Pirozzi* Action and the *Opperman* Action allege that Apple was unjustly  
 25 enriched, the two claims are different. *Pirozzi*’s theory of unjust enrichment arises out  
 26 allegations that she and members of the Class overpaid for the Apple Devices. See ¶¶123-126.  
 27 In contrast, the *Opperman* plaintiffs’ theory of unjust enrichment arises out of benefit derived  
 28 from acquisition of purchasers’ private information and distribution and/or sale of the malicious  
 apps. See *Opperman* Action complaint ¶¶417-422.

1 The *Opperman* Action also seeks the imposition of a constructive trust as well as declaratory  
2 judgment.

### 3 ARGUMENT

#### 4 **A. Local Civil Rule 3-12(a) Does Not Require the Two Cases to Be** 5 **Consolidated**

6 Local Civil Rule 3-12(a) provides that actions are related when “(1) [t]he actions concern  
7 substantially the same parties, property, transaction or event; and (2) [i]t appears likely that there  
8 will be an undue burdensome duplication of labor and expense or conflicting results if the cases  
9 are conducted before different Judges.” While the *Opperman* and *Pirozzi* Actions pertain to the  
10 same general subject matter – collection of consumer data through software applications – these  
11 cases otherwise are not suitable for coordination or consolidation. *See e.g., Hodges v. Akeena*  
12 *Solar, Inc.*, Nos. CV 09-2147 JW, 10-2735 JF, 2010 WL 2756536, at \*1 (N.D. Cal. July 9, 2010)  
13 (finding that two actions are not related where claims, named defendants and procedural postures  
14 of the actions differed).

15 Except for Apple, the *Opperman* and *Pirozzi* Actions do not share any other common  
16 defendants and do not have a single common cause of action or theory of recovery. While the  
17 *Pirozzi* Action seeks to hold Apple accountable for its misleading representations to consumers  
18 regarding the Apple Devices, the *Opperman* Action seeks to hold Apple and various app  
19 manufacturers responsible for improper data collection. Indeed, the only conceivable common  
20 claim – unjust enrichment – involves different basis for relief because *Pirozzi*’s theory of unjust  
21 enrichment arises out of allegations that she and members of the Class overpaid for the Apple  
22 Devices, while *Opperman* plaintiffs’ theory of unjust enrichment arises out of the benefit derived  
23 from acquisition of private information as well as the “distribution and/or sales of the non-  
24 conforming malicious [a]pps....” Compare ¶¶123-126 with *Opperman* Action complaint ¶¶417-  
25 422. In addition, the two actions seek to represent different classes as *Pirozzi* seeks to represent  
26 a class of those individuals who overpaid for their Apple Device, while the *Opperman* Action  
27 seeks to represent those individuals who were harmed by unauthorized data collection.



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*Counsel for Maria Pirozzi*



1 **DECLARATION OF SERVICE**

2 I, Jennifer Sarnelli, declare as follows:

3 I am over the age of eighteen years and am not a party to this action. My business  
4 address is 501 Fifth Avenue, Suite 1408, New York, NY 10017. On April 16, 2013, I served the  
5 within **MARIA PIROZZI'S OPPOSITION TO SUA SPONTE JUDICIAL REFERRAL**  
6 **FOR PURPOSE OF DETERMINING RELATIONSHIP** to all named counsel of record in  
7 *Hernandez v. Path, Inc.*, 4:12-cv-01515-YGR (N.D. Cal.), *Pirozzi v. Apple Inc.*, 4:12-cv-01529-  
8 YGR (N.D. Cal.), and *Opperman v. Path*, No. 4:13-cv-00453-JST (N.D. Cal.) as follows:



**BY ECF (ELECTRONIC CASE FILING):** I e-filed the above-detailed documents utilizing  
10 the United States District Court, Northern District of California's mandated ECF (Electronic Case  
11 Filing) service on April 16, 2013. Counsel of record are required by the Court to be registered e-filers,  
and as such are automatically e-served with a copy of the documents upon confirmation of e-filing.

12 I certify under penalty of perjury that the foregoing is true and correct.

13 /s/ Jennifer Sarnelli  
14 JENNIFER SARNELLI